Northside Electrical Contractors, Inc. *and* International Brotherhood of Electrical Workers, Local Union No. 153a/W International Brotherhood of Electrical Workers, AFL–CIO. Cases 25–CA–24492 and 25–CA–24961

August 31, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On September 19, 1997, Administrative Law Judge Jerry M. Hermele issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Charging Party filed limited exceptions and a supporting brief. The Respondent filed cross-exceptions and a supporting brief. The Respondent also filed an answering brief to the General Counsel's exceptions and the Charging Party's limited exceptions. The Charging Party filed an answering brief to the cross-exceptions. The Respondent filed a reply brief. Finally, the International Brotherhood of Electrical Workers filed a brief as amicus curiae, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions, cross-exceptions, and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] and to adopt the recommended Order, as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified below, and orders that the Respondent, Northside Electrical Contractors, Inc., Elkhart, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following as paragraph 1.

"1. Cease and desist from

(a) Discriminatorily laying off employees because of their union activities.

"(b) In any like or related manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Substitute the following for paragraph 2(d).

"(d) Within 14 days after service by the Region, post at its facility in Elkhart, Indiana, copies of the attached notice marked "Appendix.[10]" Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since June 14, 1996."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

[1] The General Counsel and Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We note that there are no exceptions to the judge's finding that unfair labor practice charges based on the alleged interrogations of union applicant Jesse Martinez in February and March 1996 are barred by Sec. 10(b).

[2] We adopt the judge's conclusion that the General Counsel met the initial burden of proving discriminatory motivation for the Respondent's refusal to hire three union applicants, but that the Respondent has proved that it would not have hired them, for legitimate reasons, even in the absence of their union affiliation. We note that the judge's analysis of the refusal-to-hire allegations is consistent with the Board's decision in *FES*, 331 NLRB No. 20 (2000), which issued subsequent to the judge's decision.

Neither the General Counsel nor the Charging Party has argued that the Respondent's policy of not hiring applicants with high current wage histories was itself discriminatorily motivated. The Board has held that such a policy can be a legitimate justification for a refusal to hire, in the absence of evidence that it has been applied in a disparate manner to avoid hiring union applicants. See *Wireways*, *Inc.*, 309 NLRB 245 (1992). Although the International Brotherhood of Electrical Workers, AFL–CIO has filed an amicus brief arguing that such a policy is inherently destructive of employees' Sec. 7 rights, the General Counsel did not make that allegation and did not litigate the case on that theory, and the Charging Party does not make the argument either. We therefore decline to address it in this case. Member Liebman has previously stated her view that *Wireways* could be undermining the enforcement of the Act in the construction industry, and that a reexamination of that decision is warranted. See *Benfield Electric Co.*, 331 NLRB No. 77, slip op. at 3 fn. 6 (2000). Nevertheless, because neither the General Counsel nor the Charging Party has argued in this case that *Wireways* should be reexamined, she agrees with her colleagues that that issue should be left for another day.

Member Hurtgen does not agree with the finding of the judge in sec. 20 of his decision that the statement by Respondent's president, Phillip Dorries, that a union "takes away the Employer, employee relationship," shows antiunion animus. Rather, Member Hurtgen finds that such expressions are privileged speech under Sec. 8(c) of the Act, and thus may not be used as "evidence of an unfair labor practice."

[3] We shall modify the recommended Order and notice to include specific injunctive provisions for the Respondent's unlawful layoff of employees Martinez and Wenger and to correct a date in the contingent provision for mailing the notice.

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discriminatorily lay off employees because of their union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Jesse Martinez and David Wenger whole for any loss of pay they may have suffered by reason of their discriminatory layoff on June 14, 1996.

WE WILL, within 14 days from the date of the Board's Order, remove from our records any reference to the unlawful layoffs of Jesse Martinez and David Wenger, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the layoffs will not be used against them in any way.

NORTHSIDE ELECTRICAL CONTRACTORS, INC.

Miriam C. Delgado, Esq., for the General Counsel.

M. Scott Hall, William Hopkins Jr., and *Mark Kittaka, Esqs. (Gallucci, Hopkins & Theisen),* of Fort Wayne, Indiana, for the Respondent.

Carl Shaffer, of Walkerton, Indiana, for the Charging Party.

DECISION

I. STATEMENT OF THE CASE

JERRY M. HERMELE, Administrative Law Judge. This is a "salting"[1] case involving Northside Electrical Contractors, Inc. (Northside), a small electrical contracting company in Elkhart, Indiana. The charges lodged by the Union, the International Brotherhood of Electrical Workers, Local No. 153, concern four discrete events: (a) Northside's discriminatory failure to hire three union applicants—Carl Shaffer, Todd Ashby and Paul Weidler—in January 1996; (b) Northside's improper interrogation of union applicant Jesse Martinez in February and March 1996 before his eventual hiring in April 1996; (c) the June 1996 promulgation of a no-solicitation rule and a threatened reprisal by Northside; and (d) the June 1996 layoffs and July 1996 "discharges" of Martinez and another union employee, David Wenger. The Union's first charge against Northside was filed on February 22, 1996, and later amended on October 4 and December 13, 1996.

On January 31, 1997, the General Counsel filed its complaint, followed by Northside's answer of February 14, 1997. This case took three days to try, from June 2–4, 1997, in South Bend, Indiana, with the General Counsel and Respondent each calling eight witnesses. Finally, briefs were filed by both parties on July 7, 1997.

II. FINDINGS OF FACT

Northside's electrical contracting business generated at least $50,000 in interstate commerce in the year preceding the General Counsel's complaint (GC Exh. 1(i)). As noted above, this is a small company, founded in 1985, owned equally by its president, Philip Dorries, and his wife and office manager Libbey Dorries (Tr. 18–19). Northside has never been unionized and performs small residential to commercial electrical work with an average of four employees (Tr. 23–28). Philip Dorries does the hiring, of people he directly knows, from recommendations of people he knows, or through short newspaper advertisements (Tr. 32–33, 49, 232–233). Prospective employees fill out an application, which Dorries typically keeps for only short periods of time (Tr. 35). Dorries looks for experienced as well as inexperienced people, as long as they are "neat" looking with good work habits (Tr. 28). Northside's wage scale is well below the 1996 union journeyman rate of approximately $22 per hour (Tr. 53–58, 133). Specifically, since 1994 the highest starting salary paid a new employee is $12 per hour, with the average starting salary at $7.37 per hour. From September 1994 to December 1996, Northside has employed 15 people, with an average tenure of about seven months (R. Exh. 4).

The company's layoff policy is based on seniority, with the last hired the first in line to be laid off. However, before mid-1996, the only significant layoff, other than for a day or two, was Randy Schug in January 1966 for about three weeks (Tr. 40–41, 47). And in the company's history, Dorries has fired just two employees (Tr. 667). The company has written on-the-job conduct, attendance and safety policies (R. Exhs. 44–48). There is also an unwritten rule that employees can talk about nonwork topics, on the job, as long as work is not interfered with (Tr. 48).

Carl Shaffer, a journeyman inside electrical wireman, is the assistant business manager and organizer for the International Brotherhood of Electrical Workers, Local 153, in South Bend, Indiana (Tr. 109). In attempting to organize nonunion companies, Shaffer utilizes the process of "salting," which encompasses three steps. First, qualified union members apply to work at nonunion firms as openly union members, making the prevailing union wage. Second, union members apply covertly as nonunion applicants understating their wage history. Any such successful applicants would be subsidized by the union for the difference between the company's nonunion wage rate and the prevailing union wage. Third and finally, the union members visit the nonunion company's jobsite to talk to the company's employees and hand out prounion literature (Tr. 488, 496–502, 532).

Shaffer began his organizing campaign at Northside in early 1996. Based on a December 31, 1995 help wanted ad run by Northside in the local newspaper, seeking an "experienced electrician," (GC Exh. 18),[2] Shaffer visited Northside's office on January 17, 1996. He also brought with him two other union members—Todd Ashby and Paul Weidler—to apply for the job. All three applicants wore union caps and buttons and filled out the application forms, describing their most recent wage history of $22.50 per hour. Afterwards, Dorries interviewed Shaffer before lunchtime and Shaffer explained that he would attempt to organize Northside during nonworking hours. Only Shaffer received an interview but he did not receive a job offer. In sum, Dorries did not take these applications seriously because the $22-per-hour wage histories were way above his Company's lower wage scale. Nevertheless, he never asked Shaffer if he would accept a lower wage rate. And because it was near lunch and he had a pending appointment, Dorries

[1] In short, the term "salting" means a union's overt, or covert, entry into a nonunion company to organize that company. Apparently, the term is analgous to "salting a mine" or "salting the books"—the introduction of foreign material to exaggerate the amount of ore in a mine or data in accounts. See *Tualatin Electric,* 312 NLRB 129 (1993).

[2] Identical ads were also placed by Northside in other local newspapers in December 1995 and January 1996 (GC Exs. 40–45).

believed it pointless to interview the other two (Tr. 50–58; 114–117).[3] Two nonunion people were hired, though, in January and February 1996—Randy Schug and Michael Beall (R. Exhs. 4, 31; GC Exh. 32).

With Step 1 complete, Shaffer commenced Step 2 in February 1996. Northside changed its newspaper ad in late January 1996 to look for an "electrician's helper." (GC Exh. 46). So, Shaffer sent union member Carey Schloemer over to Northside on February 13, 1996 to fill out a job application. Schloemer did not disclose his status as Local 153's business agent, nor did he wear any union attire (Tr. 287–290). But he did list his most recent job wage as $22 per hour (GC Exh. 33). Schloemer got an interview with Dorries who asked whether he could accept a salary of $7 per hour. Schloemer said yes. However, Schloemer never received a job offer from Dorries (Tr. 291–293).

Next, Shaffer sent union member Jesse Martinez on February 16, 1996 (Tr. 317). Martinez filled out an application stating that he made $18 per hour at his most recent job which ended in 1995 (R. Exh. 5). He did not disclose his union status. As with Schloemer, Dorries discussed a salary of around $8 per hour. According to Martinez, Dorries stated that he was not interested in hiring union people. Dorries liked Martinez's appearance but no job offer was extended at that time because Dorries was headed out on vacation (Tr. 69, 318–321). However, Dorries denies that the subject of unions came up in this interview (Tr. 625). After Dorries' return, Martinez called him which led to a second interview on March 29, this time in Dorries' truck while visiting several Northside jobsites. Because Shaffer had filed an unfair labor practice charge against Northside on February 20, 1996 (GC Exh. 1(a)), Dorries asked Martinez whether he could work with union people, to which Martinez responded yes. At this point, Dorries hired Martinez at $9 per hour (Tr. 322–325).

Michael Beall's employment with Northside lasted for only 11 days in February 1996 and Randy Schug was on layoff in March 1996. Dorries called Schug to ask whether Schug had any objection to hiring a new employee—Martinez. Schug had no objection (Tr. 546-547, 642). Schug's layoff ended in March and Martinez started work on April 3, 1996 (Tr. 326). Then, in May, Shaffer sent David Wenger, another union journeyman inside wireman, to apply covertly at Northside as a nonunion worker. Martinez recommended Wenger as well and Dorries hired him to start on May 14, 1996, at $7.50 per hour, which was below the $12 per hour that Wenger listed in his application as his most recent salary (R. Exh. 20; Tr. 72–75, 395–399). In the meantime, Dorries hired a nonunion applicant, Federico Avendano, on April 15, 1996, at $6.50 per hour (R. Exh. 4).

According to Dorries, the quality of Martinez's work was only "fair" (Tr. 71). Also, just one month into the job, Martinez had missed five of 25 employment days (R. Exh. 49). As for Wenger, senior employee John Bishop, as well as Dorries, was not particularly pleased with his work performance either (Tr. 75–76). Moreover, Wenger was often late for work, poorly dressed, was doing personal phone calls, and was leaving job sites without permission (Tr. 578, 593). In sum, Dorries did not view Wenger as a long-term employee and, as such, never bothered to confront Wenger about these matters (Tr. 623, 648–649). According to Martinez and Wenger, though, Dorries told both of them that they were doing fine (Tr. 327–329, 402). However, Dorries did have a talk with Wenger about personal phone calls (Tr. 404).

Martinez and Wenger were also on the Union's payroll while working for Northside (R. Exh. 25; Tr. 352). Also, Shaffer wrote to one of Northside's nonunion employees, Randy Schug, about the benefits of joining the Union (R. Exs. 10–11). On Wenger's first day at work, May 14, 1996, Shaffer visited a Northside jobsite and handed out prounion leaflets to the employees while they were working (Tr. 400–401). Dorries asked him to leave so as not to disrupt their work (Tr. 63–64, 119).

May and June 1996 were wet months in South Bend, Indiana (R. Exh. 23). As a result, there were significant slowdowns at two jobsites that Northside had planned to work on (Tr. 454–466). According to Dorries, therefore, he decided during the week of June 3–7 that layoffs of Martinez and Wenger were necessary. Again according to Dorries, because he tried to find other work for his employees the week of June 10–14, he delayed telling anyone about layoffs (Tr. 81). Northside records reveal the following hours worked by employees:

Week	Employee	Hours
May 20–24	John Bishop	38-1/2
	Randy Schug	40
	Jesse Martinez	40
	David Wenger	22
May 27–31	John Bishop	40
	Randy Schug	36-1/2
	Jesse Martinez	39-1/2
	David Wenger[4]	28-1/2
June 3–7	John Bishop	40
	Randy Schug	40
	Jesse Martinez[5]	31
	David Wenger	39
	Curtis Duttenhaver	40
June 10–14	John Bishop	40
	Randy Schug	32
	Jesse Martinez	30-1/4
	David Wenger	37-1/4
	Curtis Duttenhaver	39-1/2
	Tom Dorries	39-1/2

(R. Exhs. 17, 18, 19, 40). Federico Avendano's employment lasted only from April 15 to May 9, 1996. Dorries then hired Curtis Duttenhaver, on June 3, 1996. Dorries' son, Thomas, was hired on June 10, 1996, at a starting salary of $5 per hour and is still a Northside employee (R. Exh. 4).

On June 14, 1996, the chess game between the Union and Northside reached critical mass. That Friday morning Martinez presented Dorries with an undated letter from Shaffer disclosing that "David Wenger and Jesse Martinez, Jr. are now members of IBEW Local 153" and that they would stay on as employees to organize the Company (GC Exh. 16; Tr. 331). Dorries was shocked at receiving the letter from Martinez because he genuinely liked him as an employee and was disappointed that he would switch allegiance to the Union. As explained supra, however, he was less surprised about Wenger, whom he viewed as a

[3] Nor did Dorries retain these three applications, despite his belief that "I don't think that this is the end of this." (Tr. 59). Instead, the three applications "disappeared." (Tr. 63).

[4] Only Wenger failed to receive 8 hours' holiday pay for Monday, Memorial Day, May 27, 1996. It is unknown why.

[5] Martinez took a vacation day on June 7, 1996.

as a temporary employee (Tr. 622–623). According to Martinez, Dorries then told his men that there would be "no union talk during working hours," (Tr. 332); a statement Dorries denies ever making (Tr. 621). Wenger was late for work that morning and did not attend the Martinez-Dorries meeting (Tr. 407). Martinez added that Dorries also "may" have said that he was going to watch Wenger's time more closely upon receiving the letter (Tr. 332). However, John Bishop and Randy Schug both denied ever hearing Dorries tell the employees that they could not talk about the Union (Tr. 554, 572–575).

Both Martinez and Wenger performed their work that day, June 14, but at the end of the day Dorries informed both men, plus Curtis Duttenhaver, that they were laid off for two weeks due to "lack of work" caused by the wet spring job slowdown. Dorries added, though, that recalls would be possible in the next two weeks. According to Dorries, he had already decided on the layoffs one week earlier but had not told either man, hoping for an upswing in work (Tr. 79–81, 335). Also that day, Dorries was ready with a letter dated June 14, 1996, to Wenger complaining about his tardiness (GC Exh. 35). But it was not delivered to him because of the layoff that same day and Dorries' reluctance to pile on bad news. According to Dorries, it was prepared before June 14, but his wife was late in typing it up (Tr. 245–249, 601–602).

Beginning the week of June 17, 1996, only John Bishop remained as an employee, working just 36-1/2 hours that week. Randy Schug was also laid off that week (R. Exh. 41; Tr. 88, 553). On Friday of that week, June 21, Dorries recalled Martinez for 7-1/2 hours of work (R. Exh. 41; Tr. 336). Because Shaffer had decided to start picketing Northside's jobsites, Martinez alerted Shaffer as to his recall so that Shaffer knew where to picket (Tr. 383). Work picked up a little the week of June 24, with Bishop working 39-1/2 hours, Schug 26 hours, and Tom Dorries 6-1/2 hours (R. Exh. 42). Martinez elected not to return for any more sporadic hours, declining even to respond to Dorries' second recall request (Tr. 85, 337–339). Moreover, Martinez decided not to respond to a certified letter from Dorries, dated July 9, 1996, inquiring about his "intentions . . . for work." Also, the letter stated that "if I don't hear from you within 48 hours of receipt of this letter I will assume that you have no intention of returning to work here." (R. Exh. 2.) But Martinez had already secured another job—on June 24, 1996—at a union organized employer (Tr. 387), without even telling Dorries. As for Wenger, Dorries also sent him an identical July 9, 1996 certified letter (R. Exh. 1). Likewise, Wenger never responded and had also gotten another job by then (R. Exh. 21). Indeed, Wenger picketed the jobsite he had worked at on June 27, 1996—his first and last "recall" day of work with Northside (Tr. 408–410, 434).

On June 28, 1996, Shaffer visited Northside to apply for a job again, with a set of three different people. This visit came after sending Dorries a letter on June 18, 1996, in which he expressed concern about Northside's downturn in work (R. Exh. 6). But Shaffer was told that Northside was not acccepting new job applications (Tr. 120). In July, however, work began to pick up, according to Dorries (Tr. 630). For the 4-day week of July 1–5, John Bishop and Randy Schug each worked 32 hours, and Tom Dorries worked 33 (R. Exh. 43).

Shaffer filed another unfair labor practice charge with the Board on September 26, 1996, regarding the layoff and termination of Martinez and Wenger (GC Exh. 1(c)). He filed yet another charge on December 13, 1996, claiming that Northside improperly interrogated applicants for employment about their union sympathies before hiring them, and promulgated an improper no-solicitation rule on June 14, 1996 (GC Exh. 1(e)–(g)). Shaffer was busy filing charges in 1996 against nonunion companies: there were at least two other such companies on his list that year (Tr. 14–44; R. Exhs. 8–9). Finally, after the General Counsel's January 31, 1997 issuance of a complaint against Northside, Shaffer visited the company yet again on February 14, 1997, to apply for work (R. Exh. 7). This marked his 12th or so job application to various nonunion companies; none of which resulted in a single offer (Tr. 146). Also in February, Wenger telephoned Libbey Dorries asking about work in order to "plug up" Northside's hiring processes (Tr. 411–412, 444). Pursuant to Dorries' lawyer's advice, however, Northside sent Wenger a letter inviting him to file another job application (GC Exh. 36; Tr. 250–252).

III. ANALYSIS

A. Failure to Hire and/or Consider for Hire January 1996 Applicants

The General Counsel contends that Dorries' "only possible reason" for refusing to interview Ashby and Weidler, and refusing to hire Shaffer, on January 17, 1996, was Dorries' union animus. Respondent counters that, as mere job applicants and union organizers, these three individuals are not "employees" of Northside under the Act entitled to protection under Section 8(a)(3). Alternatively, Respondent argues that their $22-per-hour wage history is the reason they were not interviewed or hired.

Clearly, an employer violates Section 8(a)(3) if he refuses to hire a qualified job applicant because of that applicant's union membership or sympathies. *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177 (1941). Thus, an employer must evaluate each applicant in a nondiscriminatory manner. *Shawnee Industries*, 140 NLRB 1451 (1963), enf. denied on other grounds 333 F.2d 221 (10th Cir. 1964). Further, once a prima facie case of discrimination has been shown, an unfair labor practice is established unless the employer can prove that the applicants would still not have been hired absent the discriminatory motive. *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983).

Turning to the facts of this case, the General Counsel has established its prima facie case of an unfair labor practice regarding Dorries' refusal to hire Shaffer, Ashby, and Weidler. Specifically, the following six criteria, as set forth in *NLRB v. Fluor Daniel, Inc.,* 102 F.3d 818, 832 (6th Cir. 1996), have been met:

> (1) The employer is covered by the Act;
> (2) The applicants are covered by the Act;
> (3) The applicants applied for the job and were quail fied;
> (4) Despite their qualifications the applicants were not hired;
> (5) Antiunion animus contributed to Dorries' decision not to hire the applicants; and
> (6) The job remained open and Dorries continued to seek applicants from persons with the applicants' qualifications.

In analyzing these criteria, Northside is mistaken that *NLRB v. Town & Country Electric,* 516 U.S. 85 (1995), stands for any proposition other than the clear classification of Shaffer,

Ashby, and Weidler as "employees" under the Act.[6] The only other of the six criteria in contention is number (5): whether Dorries' antiunion animus contributed to his decision not to hire any of the three individuals. The record evidence establishes, however, that Dorries possessed a degree of antiunion animus and that it so contributed to his decision. At the outset, he admitted that a union "takes away the Employer, employee relationship." (Tr. 651). Further, Dorries' actual conduct indicated more than a mere dislike of unions. For example, he never bothered to ask Shaffer whether he would accept a salary less than his $22-per-hour journeyman rate. Also, Dorries never granted Ashby nor Weidler interviews despite their presence in the office.

However, the preponderance of the record evidence shows that Dorries' main reason for declining to hire these three individuals had nothing to do with their union status.[7] Rather, it was the current $22 per hour wage histories of Shaffer, Ashby, and Weidler which torpedoed their chance of receiving job offers. At the outset, the record is clear that Northside is a small company which, since 1994, has paid a maximum starting salary of $12 per hour, and an average starting salary of $7.37 per hour (R. Exh. 4). Thus, these three applicants' current wage histories, openly disclosed as union members, did not fit Northside's business operation. While Dorries failed to grant interviews to Ashby and Weidler, it is undisputed that he had a pending appointment at the conclusion of Shaffer's interview. Moreover, Northside's case is bolstered by Dorries' February 13, 1996 interview of Carey Schloemer, who sought work as a nonunion, $22-per-hour applicant, and never received an offer. Thus, the Schloemer interview shows that the prime disqualification for working at Northside was a high wage history, not union membership. Further, Dorries has hired union people in the past: Douglas Gfell, for example in 1995 (R. Exh. 50). Finally, although Dorries did hire one individual in 1995 with a high salary history of $42,000—Ray Roberts (GC Exh. 28)—that individual, unlike Shaffer, Ashby and Weidler, was out of work for 1 year and settled on a starting salary of just $6.50 per hour (R. Exh. 4). And it was the same story with Jesse Martinez from Dorries' perspective: a reported salary history of $18 per hour but a period of 8 months of unemployment.

Addressing several points made by the General Counsel, it is first incorrect that "Dorries testified he was concerned that Shaffer's Union activities would cause problems" for Northside. Rather, a complete reading of Dorries' testimony reveals that the reason he failed to hire Shaffer was his "$22.50 an hour" wage, not his union affiliation (Tr. 106). Second, the General Counsel incorrectly states that Dorries had a "standard" policy of interviewing all job applicants; the record is silent on the question of whether such a policy existed. Third, unlike *NLRB v. Fluor Daniel, Inc.,* supra, Dorries did not reject all three applicants for interviews that day. Fourth, too much is made of the "panicking" of Dorries' secretary upon the arrival of Messrs. Shaffer, Ashby and Weidler on January 17, 1996. As an initial matter, the secretary, Sheila King, never testified. Also, Dorries explained that it was unusual for three applicants to arrive simultaneously at their small office for interviews for one advertised job (Tr. 105). Thus, it cannot be concluded that a corporate panic ensued because of the arrival of three openly union applicants that day.

In summary, Philips Dorries' decision not to hire Shaffer, Ashby and Weidler was not as pure as the driven snow. Northside has always been a nonunion company and Dorries intends to keep it that say. However, the preponderance of the record evidence regarding this particular January 1996 incident establishes that Dorries' decision was based on a legitimate business reason, unrelated to union animus, and therefore not a violation of Section 8(a)(3). See *Wireways, Inc.,* 309 NLRB 245 (1992).

B. Interrogation of Martinez

This issue concerns the two interviews of Jesse Martinez conducted by Dorries in February and March 1996, and whether Dorries improperly interrogated Martinez about his union sympathies. Of course, unbeknownst to Dorries at the time, Martinez was a union member applying as a salt for a job at Northside. The General Counsel's theory is that because of the record evidence establishing Dorries' union animus, "it can be inferred that Dorries would interrogate job applicants as to their Union membership, activities and sympathies in order to exclude Union members from his work force." Northside's defense rests on the assertion that no prohibited interrogation of Martinez occurred and, moreover, that this aspect of the complaint should be dismissed as untimely filed.

This issued of alleged interrogation presents a stark factual disagreement between the parties. Specifically, Dorries denied that the subject of unions came up in the February 16, 1996 interview of Martinez, while Martinez testified that Dorries proclaimed that union members were not welcome to work at Northside. As for the second interview of Martinez on March 29, 1996, both parties agree that Dorries brought up the subject of unions, but Northside explains that Dorries did so only to put Martinez on notice that Shaffer had filed an unfair labor practice charge against the company on February 20, 1996.

It is unnecessary to resolve the discrepancies between the two versions of the two interviews because Northside is correct on its procedural argument: the December 13, 1996 charges (GC Exh. 1(e)) regarding the alleged interrogations of February 16 and March 29, 1996, are barred by Section 10(b) of the Act. This "statute of limitations" provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board. . . ." Here, the first mention of any improper interrogation by Dorries occurred 8-1/2 and nearly 10 months, respectively, after the alleged incidents. By way of summary, Shaffer's first charge, filed promptly in February 1996, concerned Dorries' refusal to hire Shaffer, Ashby and Weidler in January 1996. Shaffer's second charge, filed in September 1996, concerned the June 1996 layoff of Martinez and Wenger. That, of course, would have been the logical vehicle to allege the interrogation of Martinez, who was already long gone from Northside's employ. But, without any explanation or justification in the record, the interrogation charge was not filed until December 13, 1996. The General Counsel contends that the December 1996 charges are permissible because they "are related to" the original charges and "grow out of them while the proceeding is pending before the Board." *NLRB v. Fant Miller Co.,* 360 U.S. 301 (1959), citing *National Licorice Co. v. NLRB*, 309 U.S. 350

[6] While the Supreme Court did not reach the ultimate question of whether an unfair labor practice occurred in that case, they held that an "employee . . . does not exclude paid union organizers." 516 U.S., supra at 98.

[7] Therefore, it is unnecessary to address Northside's contention that the appropriate standard of proof for its affirmative defense on this charge is less than a preponderance of the evidence—only a "legitimate business justification" standard.

(1940). Further, the General Counsel contends that this December 1996 amendment comports with the criteria of *Nickles Bakery of Indiana,* 296 NLRB 927 (1989), permitting late amendments where:

> (1) the allegations involve the same legal theory as the timely filed allegations;
>
> (2) the allegations arise from the same factual circumstances or sequences of events; and
>
> (3) the Respondent would raise similar defenses to both allegations.

See also *Redd-I, Inc.,* 290 NLRB 1115 (1988). Northside agrees with the General Counsel's legal criteria but comes to an opposite conclusion.

As noted supra, the Presiding Judge agrees with Northside's resolution of this issue. First, the General Counsel's complaint alleges a Section 8(a)(1) violation regarding the interrogation of Martinez, while alleging an 8(a)(1) and 8(a)(3) violation regarding the refusal to hire Shaffer, Ashby and Weidler. Hence, different legal theories apply to the two alleged violations. Second, the two charges involve two distinct sets of people; one set of three people not hired at all (and two of three not interviewed at all), and Martinez who was interviewed twice and ultimately hired. Moreover, it is sophistry for the General Counsel to contend that both charges "are part of the employers' overall plan to resist employees' unionization. . . ." *Jennie-O Foods,* 301 NLRB 305 (1991). If that is indeed the only standard, virtually every late-filed amendment would be permitted. Lastly, Northside's defenses to the two sets of charges are quite different. Thus, it is concluded that the alleged interrogations first raised in GC Exh. 1(e) are time-barred by Section 10(b). Accordingly, paragraph 5(a)(i) and (ii) of the Complaint will be dismissed.[8]

C. June 1996 No-Solicitation Rule and Threatened Reprisal

The genesis of these alleged 8(a)(1) violations lies in Martinez's presentation of the "coming out" letter to Dorries on the morning of June 14, 1996, in which the union status of Martinez and Wenger was formally revealed. According to Martinez, Dorries' reaction to this disclosure was his immediate promulgation of a "no union talk during working hours" rule; the first such Northside rule barring talking about anything. The General Counsel theorizes that this antisolicitation rule was clearly in retaliation for the letter presented by Martinez. As for the reprisal aspect of the complaint, the General Counsel contends that Dorries also threatened to watch Wenger's time more closely upon receiving the letter. Northside contends that, aside from being disappointed in Martinez's "defection" to the Union, Dorries promulgated no such antiunion-talking rule, nor threatened anything about Wenger. Moreover, Respondent argues that these alleged matters are likewise time-barred under Section 10(b) of the Act. Specifically, although they were first raised in a charge dated December 13, 1996, just within the six-month period following June 14, 1996, they were not mailed until December 16, 1996 (GC Exh. 1(g) and (h)).

At the outset, this Section 10(b) analysis yields a different result. Again pursuant to the criteria of *Nickles*, the events of June 14, 1996, are all interconnected and stem from Martinez's presentation of the union letter to Dorries that morning. According to the General Counsel, that triggered the antiunion rule and reprisal remark from Dorries, as well as the layoffs of Martinez and Wenger at the end of that workday. Thus, the antisolicitation and reprisal charges, although received by Northside just over six months after June 14, 1996, clearly relate to the layoff charge which was timely filed. Accordingly, they will be considered.

Dealing first with the alleged threat to watch Wenger's time more closely, it is significant that Martinez only testified that Dorries "may" have said it. Indeed, Wenger admitted that he was in fact late for work that morning. Therefore, given Dorries' credibly offered denial, the record evidence does not support a conclusion that Dorries threatened Wenger, via Martinez or anyone else, in retaliation for receiving the letter on June 14. Turning to the alleged antisolicitation rule, only Martinez testified that Dorries promulgated it. Dorries flatly denied issuing such a rule, and he was backed up by two of his employees, John Bishop and Randy Schug. In this regard, if Dorries really wanted to stifle the organization of his company, on learning that Martinez and Wenger were now union members, he arguably would have told Bishop and Schug of this no-talking rule. Moreover, no such written rule was issued, as was Dorries' practice regarding other on-the-job conduct. So, that leaves Martinez's uncorroborated testimony. But if it comes down solely to a choice of believing Martinez or Dorries, the record contains no extrinsic evidence of untruthfulness by Dorries. However, the same cannot be said of Martinez, who falsified his Northside job application and testified that he would "perhaps" lie in order to salt for the union (Tr. 353–354). In sum, the General Counsel has failed to prove by a preponderance of the evidence that Dorries violated Section 8(a)(1) on June 14, 1996, with an anti-solicitation rule or threatened reprisal.

D. Layoffs and Discharges of Martinez and Wenger

Again, the General Counsel must establish that the employer's union animus was a motivating factor in the decision to lay off Martinez and Wenger. If this is established then the Respondent has the burden of proving that the layoffs would have occurred anyway, for permissible reasons. *Wright Line,* 251 NLRB 1083 (1980). The presiding judge concludes that the General Counsel has met its burden. As already discussed, there is abundant evidence of Dorries' desire to keep Northside nonunion, albeit insufficient evidence so far to sustain a violation of the Act. That changes, however, with this allegation of the General Counsel. First, the plain fact is that the timing of the layoffs of Martinez and Wenger—the same day as their revelation as union members—is highly suspicious. See *NLRB v. Rain-Ware, Inc*., 732 F.2d 1349, 1354 (7th Cir. 1984). Although Dorries claimed that these layoffs were in the works for at least several days before June 14, there is no evidence to corroborate this self-serving explanation. Second, the affirmative defense of a work slowdown caused by the wet spring is unpersuasive. In this regard, Northside failed to produce any evidence about its business cycles from 1983 to 1995. Surely, it was wet before in Indiana and/or other general contractors experienced work slowdowns. Without the complete picture of Northside's 15-year business cycles, it is impossible to conclude whether the spring of 1996 was an anamoly necessitating the layoff of half its workforce on the same day. Third, it is highly illogical that if Dorries was indeed worried about a falling workload the week of June 10, he would have *hired* another employee on June 10: his son Thomas. In sum, Northside's proffered defense does not establish, by a preponderance of the evidence, that Martinez and Wenger were laid off for a permissible reason.

[8] See par. 30, below, however, for a resolution of the Dorries v. Martinez credibility matter.

Turning to the second of the General Counsel's allegations, there is no evidence of a "discharge" of Martinez and Wenger. Indeed, Northside had an established business practice of temporary layoffs, as evidenced by Randy Schug's short-term idleness in March 1996. Nor was there any constructive discharge, which is defined as a burden imposed on an employee by an employer which "must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign." *Crystal Princeton Refining Co.,* 222 NLRB 1068, 1069 (1976). Here, Dorries recalled Martinez for work for one day the week after the layoff, and attempted to do for one day the second week. Wenger was recalled for one day during that second week also. The General Counsel characterizes these recalls as "sporadic. . . designed to cause them to look for employment elsewhere. . . ." While both men indeed found work elsewhere—Martinez on June 24 and Wenger around that time as well—the Presiding Judge concludes that both Martinez and Wenger voluntarily resigned from Northside, at the very latest during the week of July 9, 1996, when they failed to respond to Dorries' certified letters inquiring whether they intended to come back to work. Moreover, these relatively short two-week layoffs were not accompanied by other adverse changes in the employment of Martinez and Wenger to force their resignations. Compare *Norris Concrete Materials,* 282 NLRB 289 (1986); *Boyles Galvanizing Co*., 239 NLRB 530 (1978). Further, the similar short-term layoff of Randy Schug on June 14—his second of the year—did not cause him to leave. In sum, there was no discharge, constructive or otherwise, of Martinez or Wenger. Rather, with their Northside organizational efforts at an apparent end, Martinez and Wenger unilaterally resigned upon being temporarily laid off. See *Central Casket Co*., 225 NLRB 362 (1976). As such, their "hasty self-help action" does not warrant relief, such as reinstatement, under the Act. *Groves Truck & Trailer*, 281 NLRB 1194 (1986).

IV. CONCLUSIONS OF LAW

1. The Respondent, Northside Electrical Contractors, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, the International Brotherhood of Electrical Workers, Local Union No. 153, a/w International Brotherhood of Electrical Workers, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The General Counsel has failed to prove its allegations at paragraph 6(a) and (b) of the complaint that Respondent violated Section 8(a)(1) and (3) of the Act in refusing to hire or consider for hire Carl Shaffer, Todd Ashby, and Paul Weidler.

4. The complaint's interrogation allegations at paragraph 5(a)(i) and (ii) are dismissed pursuant to Section 10(b) of the Act.

5. The General Counsel has failed to prove its allegations at paragraphs 5(a)(iii) and (iv), and 5(b) and (c) regarding antisolicitation and threatened reprisals.

6. Pursuant to paragraphs 6(c), (e), and 8, of the complaint, Respondent violated Section 8(a)(1) and (3) of the Act by laying off its employees, Jesse Martinez and David Wenger, on June 14, 1996. However, pursuant to paragraph 6(d), the General Counsel has failed to prove that Respondent discharged Jesse Martinez or David Wenger.

7. The unfair labor practices of Respondent described in paragraph 6, above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Accordingly, IT IS ORDERED that Respondent, Northside Electrical Contractors, Inc., Elkhart, Indiana, its officers, agents, successors, and assigns, shall[9]

1. Cease and desist from, in any like and related manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Make Jesse Martinez and David Wenger whole for any loss of pay they may have suffered by reason of their unlawful layoffs, to be computed as set forth in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

(b) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days from the date of this Order, remove from its files, any reference to the unlawful layoffs, and within 3 days thereafter notify the former employees in writing that it has done so and that it will not use the layoffs against them, in any way.

(d) Within 14 days after service by the Region, post at its facility in Elkhart, Indiana, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 20, 1996.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

3. IT IS ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

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[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[10] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."